Supreme Court, U.S.
FILED
JAN 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CRAIG VEVODA, KENNETH CHAMNESS, and MARK SOTTANA,

Petitioners,

v.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*, OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners. Respondent has refused consent for the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory-unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; rights to due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States.

To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from joining or supporting labor organizations.* And in numerous on-going cases throughout the country, the Foundation is now aiding employees who have been denied, or coerced or defrauded in the exercise of, their right to refrain from becoming or remaining formal union members, subject to internal union rules and discipline, as a condition of employment.

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Court of Appeals for the Ninth Circuit could seriously undermine the constitutional and statutory rights of individual employees to work free from coerced union membership, and could largely eviscerate the duty of unions to repre-

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* *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984); Minnesota State Bd. for Community Colleges v. Knight, ___ U.S. ___, 104 S. Ct. 1058 (1984); Hudson v. Chicago Teachers Union, Local No. 1, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2700 (1985) (oral argument held 2 December 1985).

sent all employees in a fair and nondiscriminatory manner.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Foundation recognizes that petitioners have fully and ably argued their own, personal interests in having this Court grant a writ of certiorari. Yet, by naturally focussing on their particular circumstances, petitioners may not have sufficiently emphasized the truly nationwide importance of the Court of Appeals' decision in misapplying controlling labor-law doctrines concerning coerced union membership, in jeopardizing the constitutional and statutory rights of individual employees throughout the United States, and in creating the danger of (and, indeed, supplying an excuse for) wholesale future violations of unions' duties of fair representation. Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the immediate significance and potential consequences of the Court of Appeals' erroneous ruling, and of the pressing need for this Court's review thereof by writ of certiorari.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

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Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of petitioners.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

This Court should issue a writ of certiorari because the Court of Appeals' decision: (i) encourages unions throughout the country to deceive or coerce employees into accepting full union membership as a condition of employment; and (ii) eviscerates the unions' duties of fair representation as far as collective-bargaining agreements providing for compulsory unionism are concerned, in violation of national labor law, the United States Constitution, and every relevant decision of this Court on the subject.

ARGUMENT

The importance of this Court's review of the Court of Appeals' decision lies in that court's candid admission that "[u]ndoubtedly the [petitioners] were under the impression that they had to become union members, since the collective bargaining agreement so stated", juxtaposed to its astounding conclusion that, notwithstanding the *false* and *illegal* "impression" the collective-bargaining agreement foisted on petitioners, petitioners' union membership was *not* induced by misrepresentation and coercion. If this Court allows the Court of Appeals' decision to stand on such patently self-contradictory reasoning, individual employees throughout the United States will suffer increasing impairment of their right to

work free from compulsory union membership; and unions will enjoy a new rationalization for violating the duties of fair representation that they owe to union and nonunion employees alike.

I. Review of this case is necessary to protect the constitutional and statutory rights of individual employees throughout the United States to work free from coerced union membership.

In both private- and public-sector cases, this Court has consistently held that, although an employer and union may agree to condition the continued employment of individual workers on the workers' union membership, "such membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of [union] fees and dues".[1] Thus, under the statute applicable here, petitioners' "'membership' as a condition of employment is whittled down to its financial core".[2] "[S]uch membership", this Court explained in an analogous context,

> encompasses only the financial obligations of union participation and does not include formal union membership. Accordingly, a collective bargaining agreement can require an employee to share in the expenses of union activity; it may not mandate that he actually join the union as a condition of employment.[3]

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[1] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n. 10 (1977).

[2] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), *interpreting* § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3).

[3] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 235-38 (1956),

Whether "financial-core membership" arises out of statutory limitations on the privilege of employers and unions to condition employment on compulsory unionism (as it does under the private-sector National Labor Relations and Railway Labor Acts), or derives from the First Amendment's protection of employees' freedom not to associate with unions (as it does in the public sector generally), its practical significance to individual employees is large. For, by choosing "financial-core membership", an employee can completely remove himself from the jurisdiction of a union's constitution and other internal organizational rules, and thereby from the union supervision, control, and discipline that reaches full-fledged, formal members.[4] Thus, in this case, had respondent afforded petitioners the option of "financial-core membership" that national labor law requires, no justiciable controversy would have ensued after petitioners refused to join respondent's strike.

Unfortunately, respondent did not apprise petitioners of their "financial-core option", choosing instead to exploit their ignorance of the law and their natural misunderstanding of the blatantly misleading language of the collective-bargaining agreement to impose full formal union membership on them through misrepresentation and coercion. Thus, this case constitutes one of an untold — but doubtlessly large — number of situations throughout American industry where, although "collec-

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interpreting § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, which corresponds functionally to § 8(a)(3) of the National Labor Relations Act.

[4] *E.g.*, Pattern Makers' League v. NLRB, ___ U.S. ___, ___ & n.16, 105 S. Ct. 3064, 3071-72 & n.16 (1985); Service Employees Local 680 v. NLRB, 601 F.2d 980, 981 (9th Cir. 1979).

gaining agreements which refer to union membership as a condition of employment cannot be implemented beyond requiring workers to pay the equivalent of union dues", "because this fact is not widely known, numerous workers may be misled into becoming full union members".[5]

Typically, compulsory-unionism clauses in collective-bargaining agreements incorrectly describe employees' obligations to the unions in all-encompassing terms such as "member" or "membership", without any suggestion that as a matter of law these terms may at most import only limited "financial-core membership". As did petitioners here, however, "[t]he average worker, unversed in the tortuous complexities of statutory interpretation, [will] normally construe [the word 'membership'] to mean membership in the colloquial sense—*i.e.*, full membership";[6] and, on the basis of this quite natural misunderstanding, will acquiesce in the full membership that a union could not induce him to accept or impose upon him after a candid disclosure of the facts. Indeed, one need be neither paternalistic nor cynical to recognize, as has this Court, that, "[i]n the labor setting, * * * the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union"[7]—leading to the expectable, if

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[5] Cantor, "Uses and Abuses of the Agency Shop", 59 *Notre Dame L. Rev.* 61, 61 n.2 (1983).

[6] T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* (Lab. Rel. & Pub. Pol'y Series No. 15, 1977), at 69-70. *See also* D. Heldman, J. Bennett, & M. Johnson, *Deregulating Labor Relations* (1981), at 70-71.

[7] Delcostello v. Teamsters, 462 U.S. 151, ____, 103 S. Ct. 2281, 2291 (1983).

not inevitable, result that union self-interest in compelling full membership as a condition of employment, coupled with employee ignorance of the true state of the law, will almost always conjoin to override the employee's will.

That, as far as compulsory-unionism clauses in collective-bargaining agreements are concerned, union representation of and full disclosure to employees are manifestly deficient even the most ardent defenders of unions concede. None other than eminent labor-attorney Joseph L. Rauh, Jr. criticized "[t]he labor movement" for

> never own[ing] up to the fact that nobody has to belong to a union in this country. No law requires anyone to belong to a union. The only thing required is that a person pays his dues so he gets the benefits of the union. *But labor hides that fact. A labor union doesn't advertise the agency shop.*[8]

Yet the law is crystal-clear that unions owe employees a fiduciary duty to inform those employees of their *exact* obligations under compulsory-unionism agreements.[9] The notorious discrepancy between this duty, and what unions actually do to circumvent their responsibilities in most situations, points up the unions' fear that, if employees actually understood their rights, most would

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[8] BNA Daily Labor Rpt., Current Developments Section, No. 17, 25 January 1978, at A-3 (emphasis supplied).

[9] *E.g.*, NLRB v. Teamsters Local 291, 633 F.2d 1295, 1298-99 (9th Cir. 1980). *See, e.g.*, Electrical Workers (IUE) Local 801 v. NLRB, 307 F.2d 679, 683-84 (D.C. Cir.) (opinion by Burger, J.), *cert. denied*, 371 U.S. 936 (1962).

choose the "financial-core membership" the labor laws offer. And, derivatively, it points up the presumptive (if not conclusive) illegality of every compulsory-unionism agreement throughout the United States the "financial-core option" of which unions have not fully and fairly explained to the employees affected.[10]

Here, absent reversal by this Court, the Court of Appeals' decision will provide a perverse precedent rationalizing, both within the Ninth Circuit and elsewhere, a new excuse for continuing judicial enforcement of thousands of compulsory-unionism agreements that, if not invalid on their faces, are certainly inapplicable as against employees whose full union membership was the product of their misunderstanding of the law, induced by the careful silence (or self-serving "ignorance") of union officials. That this result violates the National Labor Relations Act goes without undue emphasis, having been held to offend the statute time and again at every level of the judicial and administrative systems. That it will also violate the Constitution requires no extraordinary process of reasoning, either.

Where, as here, a union sues a purported "member" to collect an *unlawful* fine, the "suit * * * has an objective that is illegal under federal law".[11] Specifically in this case, the fines respondent sought to collect were unlaw-

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[10] *See, e.g.*, Retail Clerks Internat'l Ass'n, 226 N.L.R.B. 80, 89-90 (1976) (absent evidence that union advised employees of "financial-core option", "it must be held that the employees joined [the union] under [illegal] compulsion").

[11] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, ___ n.5, 103 S. Ct. 2161, 2167 n.5 (1983).

ful, because petitioners' membership in the union (the necessary predicate for the imposition of any fines) the union itself illegally obtained in the first instance through misrepresentation and coercion. Yet the Court of Appeals held that respondent may nevertheless sue to collect these unlawful fines, with immunity from petitioners' otherwise dispositive defense under federal labor law, because it claims "ignorance" of the illegality of its earlier requirement that petitioners become its full, formal members. If this Court allows the Court of Appeals' decision to stand, it will inadvertently countenance, in this and other cases applying this case as precedent, a clear-cut violation of the Due Process Clause of the Fifth Amendment to the United States Constitution (where a federal court entertains such a fine-collection suit with "an objective that is illegal under federal law") or of the Supremacy Clause of the Constitution[12] (where a state court entertains such a suit).

Thus, whether viewed as an attempt to circumvent the limitations on compulsory unionism imposed by section 8(a)(3) of the National Labor Relations Act, or as an arrant disregard of the provisions of the Constitution absolutely mandating that those limitations be recognized and enforced in the federal and state courts, the decision of the Court of Appeals cries out for this Court's intervention by writ of certiorari.

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[12] U.S. Const. art. VI, cl. 2.

II. Review of this case is necessary to prevent unions from violating the duties of fair representation they owe to individual employees.

The Court of Appeals' silence on respondent's violation of its duty of fair representation to plaintiffs in this case provides further support for the issuance of a writ of certiorari. The court's reticence on this issue is inexplicable because: (i) that duty imposes on every union an affirmative obligation to inform employees subject to a compulsory-unionism agreement of the substantive and procedural limitations of federal labor law on such agreements; and (ii) the strictness with which the courts must enforce that duty partakes of its *quasi*-constitutional nature and importance.

In the case that first fashioned the duty of fair representation, *Steele* v. *Louisville & Nashville Railroad Co.*,[13] this Court held that the creation and enforcement of that duty was necessary to avoid serious constitutional questions arising from national labor law's grant to unions of the status of exclusive collective-bargaining agents for non-consenting employees. In addition to holding that the status of exclusive bargaining-representative "imposes upon [a union] at least as exacting a duty to protect equally the interests of [all employees] as the Constitution imposes upon a legislature to give equal

[13] 323 U.S. 192 (1944). Although *Steele* arose under the Railway Labor Act, on the very same day it decided *Steele* this Court imposed the duty of fair representation on unions acting as exclusive collective-bargaining agents under the National Labor Relations Act. Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944). Significantly, this decision arose under the predecessor to § 8(a)(3) of that act.

protection to the interests of those for whom it legislates", the Court further emphasized that national labor law

> require[s] the union, in collective bargaining and in making contracts with the [employer], to represent non-union * * * [employees] without hostile discrimination, fairly, impartially, and in good faith. Whenever necessary to that end, the union is required * * * to give [non-union workers] notice of and opportunity for hearing on its proposed action.[14]

Thus, *Steele* recognized that the duty of fair representation embodies a requirement that unions afford the employees they represent a right akin to procedural due process of law.

In a case such as this, the procedural-due-process aspect of the duty of fair representation self-evidently includes providing employees both a clear explanation of the limitations on compulsory unionism mandated by section 8(a)(3) of the National Labor Relations Act,[15] and a fair opportunity for workers to exercise their option to select "financial-core membership" if they desire. Yet the Court of Appeals' decision—without even alluding to the issue—eviscerates the procedural-due-process content of the duty of fair representation, licensing respondent (and other unions similarly situated and motivated) to remain silent when they have an affirmative duty to speak, to misrepresent employees' obligations through the calculated use of deceptive language in

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[14] 323 U.S. at 202, 204.

[15] *See* Teamsters Local 162 v. NLRB, 568 F.2d 665, 669 (9th Cir. 1978).

collective-bargaining agreements, or (as here) to do both. A result more blatantly at odds with *Steele*, and with the constitutional imperatives informing that decision, would be difficult to imagine, and cannot receive this Court's silent approbation.

CONCLUSION

For the foregoing reasons, the Foundation urges this Court to grant the petition and issue a writ of certiorari.

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that officials of Local 302 'lied' to the defendants or 'actively misled' them into joining the union. Their affidavits recite that a receptionist handed Vevoda and Sottana membership forms and an officer administered the oath required for membership in the Local. No representative of the union ever told any of the defendants that they would be fired if they resigned from full-fledged union membership and merely paid dues. It does not appear that anyone, plaintiff or defendants, ever thought of such a possibility during the period in question. Undoubtedly the defendants were under the impression that they had to become union members, since the collective bargaining agreement so stated. But there is no suggestion that any union representatives had any knowledge of the gloss which the NLRB and the courts have superimposed upon the statutes authorizing such clauses. Indeed it would have been unreasonable to expect the union agents to have any such knowledge in this case. It was not until 1979, the year after the strike occurred (though several years before these defendants asserted their defense), that this circuit decided that a union could not require full-fledged union membership under union security agreements similar to that under which these defendants were working. *United Stanford Employees*, 601 F.2d 980."

In summary, the Court concluded that the District Court's decision could not stand whether "principles of federal labor law or California fraud law" were to apply (*ibid.*).

REASONS FOR DENYING THE PETITION

1. The Court of Appeals reversed the summary judgment entered in favor of Petitioners on two grounds. One of these grounds rests upon the evaluation of the court below of facts presented by Petitioners in the documents supporting their motion. Petitioners had argued, based on their uncontroverted affidavits, that the Union had fraudulently misled them into accepting Union membership which they did not want, under fear that they would otherwise lose their jobs. This argument, which is accepted as a presupposition of the questions Petitioners seek to present to this Court (Pet. p.i), and is repeated in the Petition itself (Pet. pp. 17-22), has been rejected by

the court below as simply unsupported by the underlying affidavits (Pet. App., A, p.7).

The question presented on this branch of the case thus involves a factual dispute. The premise for Petitioners' position is destroyed if, as concluded by the court below, the Union made no misrepresentation of any kind to Petitioners in connection with their acquisition of Union membership. Accordingly, before Petitioners can properly submit to this Court the legal question of whether they were released from their obligations of Union membership because of the Union's fraudulent conduct, they must first demonstrate that the Court should reject the finding that there was no misrepresentation.

It cannot be gainsaid that the Court of Appeals was acting within its proper province in reviewing *de novo* the District Court's conclusion that the Union was guilty of misrepresentation. On appeal from the entry of a summary judgment, the federal courts of appeal are free to draw their own conclusions from underlying facts about which the district courts find that there is no genuine dispute. *Thrasher v. State Farm Ins. Co.*, 734 F.2d 637, 638 (1984); c.f. *United States v. Diebold*, 639 U.S. 654, 655 (1962). It is inappropriate for this Court to overturn factual conclusions of the courts of appeal in such cases. See, Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol.17, Section 4036, p.31 (West 1978).

The foregoing analysis is sufficient to dispose of the Petition in its entirety. Although the Petitioners also present a question of the preemptory jurisdiction of the National Labor Relations Board, a question discussed below, the ruling of the court of appeals that the Union was not guilty of misrepresentation constitutes an independent basis for sustaining its decision. Accordingly, this case is not appropriate for a grant of certiorari to review the preemption question.

2. The conclusion of the Court of Appeals that the District Court was without jurisdiction to entertain Petitioners' contentions dealing with alleged misconduct of a union in compelling membership under a union security clause is in any event correct and should not be disturbed.

The central thesis of Petitioners' position is that the obligations of union membership are not enforceable when acquired pursuant to a compulsory membership clause in a collective bargaining agreement, but under pressure of union misrepresentations concerning the requirements of the clause. The validity of this argument is necessarily measured by the principles of federal law governing union security clauses.

The circumstances under which a union may require union membership as a condition of employment and the scope of membership obligations which are incurred under a union security clause are the subject matter of comprehensive regulation under Sections 7, 8(a)(3) and 8(b)(2) of the National Labor Relations Act. Thus, a union violates the Act, if it causes the discharge of an employee for failure to pay current dues without first advising the employee as to the amount he owes, the consequences of nonpayment, and affording him an opportunity to make payment. *NLRB v. Teamsters Local 291*, 633 F.2d 1295 (C.A.9, 1980). This ruling reflects the principle that a union has "a fiduciary duty . . . [to] deal fairly with employees . . ." in areas where their job security is involved, and to provide such information to them as will enable them to "take whatever action is necessary to protect [their] job tenure." *NLRB v. Hotel Employees Union Local 568*, 320 F.2d 254, 258 (C.A.3, 1963). Similarly, a union commits an unfair labor practice under the Act by taking action to enforce a union security agreement where tender of dues is made, but the employee declines to take the oath of membership. *Union Starch and Refining Co. v. NLRB*, 186 F.2d 1008

(C.A.7, 1941). Here again, the union had acted in a manner that exceeds the carefully circumscribed area which is allowed it under Section 8(a)(3) of the Act. Another example of the Act's proscriptions in enforcing compulsory membership agreements—an example analogous to the facts in this case—is a union's efforts to compel full-fledged membership and its refusal to accept resignations from membership by those who seek to avoid full membership obligations. *Service Employees Local 680 v. NLRB*, 601 F.2d 980 (C.A.9, 1979). For cases dealing with the Act's regulation of efforts to escape internal union discipline through resignation from membership, see, e.g., *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), and *Pattern Makers League v. NLRB*, 473 U.S. ___, 87 L.Ed 2d 68, (1985). It may be added that the basic proposition that the Act does not prohibit union fines for crossing picket lines was established many years ago in *NLRB v. Allis-Chalmers*, 388 U.S. 174 (1967).

From the foregoing it is clear that the nature and scope of a union's obligations in the administration of a union security agreement are measured by federal law embodied in the National Labor Relations Act and administered by the National Labor Relations Board. In arguing that the Union in this case was guilty of misleading conduct in failing to inform Petitioners that they are not required to become formal Union members in order to comply with the applicable union security agreement, Petitioners are simply asserting that the Union was guilty of an unfair labor practice. It may quickly be added that in the many years the Board has dealt with the myriad questions arising in union security cases it has never held that unions are obliged to inform employees subject to compulsory membership clauses that they may forego formal membership so long as they pay the equivalent of dues and fees. Arguably, the question could be resolved either way, but it has long been established that a determination of this kind is exclusively for the Board to make. *Building*

Trades Council v. Garmon, 359 U.S. 236 (1959); *Machinists v. Wisconsin Commission*, 427 U.S. 132 (1976).

This Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), is not to the contrary. The preemption doctrine was held not to preclude the defendant in that case from asserting as a defense in a collection suit that the contract under which it was obligated to make payments to an employee benefit fund was invalid under Section 8(e) of the Act, and therefore an unfair labor practice. An agreement which violates Section 8(e) is a contract with respect to which courts generally have concurrent jurisdiction under Section 301 of the Act. See, *Smith v. Evening News Association*, 371 U.S. 195 (1962). Section 301 jurisdiction, however, does not negate the exclusivity of the Board's jurisdiction in respect to conduct which relates not to matters of contract interpretation, but to the interpretation of the National Labor Relations Act and the application of federal labor policy. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971); *Glaziers Local 767 v. Custom Auto Glass*, 689 F.2d 1339 (1982). The question which Petitioners raised in the District Court requires evaluation of "a union's dealings with employees about union membership . . . [which is] conduct closely regulated by sections 7 and 8 of the NLRA" (Pet. App. A p.5). The *Garmon* principle is accordingly controlling.

3. Petitioners' contention that the decision below conflicts with decisions dealing with federal preemption in other circuits is without merit.

Marden v. IAM, 576 F.2d 576 (C.A.5, 1978), cited at page 10 of the Petition, does not deal with a preemption question. The case arose under the Railway Labor Act, 45 U.S.C. Sections 151, *et seq.* which does not contain unfair labor practice provisions, the enforcement of which is vested in a federal agency, as is the case with the National Labor Relations Act. Its provisions are enforced by the

federal courts, which have plenary jurisdiction to deal with alleged violations. Manifestly, the same principles of preemption which are established with respect to the National Labor Relations Board have no application.

Beck v. Communications Workers, ___F.2d___, 120 LRRM 2957 (C.A.4, 1984), concerns the uses to which a union may put money derived from dues and fees under an agency shop provision. Accepting the Court's view in that case that an inappropriate use of union funds constitutes a violation of the duty of fair representation, the decision nonetheless had no bearing on the claims which Petitioners have made in this case. The doctrine of fair representation protects employees from "arbitrary union conduct against employees when the union provides the employees' only redress against the employers." *Archer v. Airline Pilots Association*, 609 F.2d 934, 939 (C.A.9, 1979). Petitioners' protest against the Union in this case is based neither on the negotiation of a collective bargaining agreement on their behalf nor the handling of a grievance which the Union controls by virtue of its status as their exclusive representative. This distinction renders inapplicable other decisions cited by Petitioners (Pet. p.12) in which federal district court jurisdiction rests upon their authority to entertain unfair representation issues. Compare, *Vaca v. Sipes*, 386 U.S. 171 (1967).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

January 21, 1986.

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APPENDIX

The following provisions of the National Labor Relations Act (29 U.S.C. Sections 151 et seq.) are relevant to the issues in this case.

Section 8(a)(3):

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b)(2):

> (2)To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on

some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;